

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRANCES CUCINELLA TRUST, by JOHN M.  
CHASE, JR., Successor Trustee,

UNPUBLISHED  
February 13, 2014

Plaintiff-Appellee,

v

No. 310213  
Wayne Circuit Court  
LC No. 09-024897-CK

DAVID L. VERDUCE, Individually and as  
Trustee of DAVID L. VERDUCE TRUST,

Defendants-Appellants,

and

JAY CUCINELLA, JANE DOE, JOHN DOE,  
DOWNRIVER PLASTICS, INC., and  
MICHIGAN CERAMIC SUPPLY, INC.,

Defendants.

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Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this dispute arising from the sale of commercial real estate by land contract, defendant David L. Verduce Trust (the Verduce Trust) appeals by right the trial court's amended judgment ordering plaintiff Frances Cucinella Trust (the Cucinella Trust) to pay \$5,333.73 to the Verduce Trust. Specifically, the Verduce Trust argues that the trial court erred when it calculated the Verduce Trust's deficiency after the foreclosure of the land contract. When the deficiency is properly calculated, the Verduce Trust maintains, it is evident that the Cucinella Trust should have paid the Verduce Trust more than \$74,000. Because we conclude there were no errors warranting relief, we affirm.

**I. BASIC FACTS**

In October 2001, the Cucinella Trust sold two commercial properties—2863 and 4088 7<sup>th</sup> Street in Wyandotte, Michigan—to the Verduce Trust by land contract for \$400,000. By 2009, the Verduce Trust had become substantially behind on its monthly payments and had not made some of the insurance and tax payments required under the land contract.

In an August 2009 letter, the Cucinella Trust's lawyer informed the Verduce Trust that the Verduce Trust would forfeit its interest in the real property unless it paid more than \$143,000; that amount included the arrearage, more than \$52,000 in delinquent taxes that the Cucinella Trust had already paid, and the unpaid balance of taxes remaining on the properties. The Cucinella Trust's lawyer also gave the Verduce Trust notice that it had forfeited its interest by breaching the land contract, but stated that it "shall elect any and all available remedies under Michigan law including but not limited to forfeiture and/or foreclosure . . . ."

In October 2009, the Cucinella Trust sued Verduce, the Verduce Trust, and various known and unknown tenants who the Cucinella Trust believed were leasing space on the properties at issue. The Cucinella Trust alleged five counts. It alleged a breach of the land contract and, on the basis of that breach, asked the trial court to accelerate the land contract, calculate the total amount due, and enter judgment on that amount. It further asked the trial court to include a provision in the judgment permitting the Cucinella Trust to foreclose against the real property if the Verduce Trust failed to pay the total judgment within the time prescribed by law. The Cucinella Trust alleged a claim for foreclosure that asked for similar relief. In a third count, the Cucinella Trust asked the trial court to appoint a receiver to preserve the real property from waste. The Cucinella Trust also asked the trial court to quiet title to the properties in the Cucinella Trust in a fourth count. Finally, for its fifth count, the Cucinella Trust alleged that it was entitled to any breach of contract damages that might occur after the completion of foreclosure proceedings against the real property.

In November 2009, the Cucinella Trust asked the trial court to order the tenants to pay any rents for the properties at issue into an escrow account. The trial court agreed and entered an order in December 2009 directing the tenants to pay their rent payments into an escrow account commencing that same month. The tenants paid more than \$39,000 into the escrow account over the course of the litigation.

In February 2010, the Cucinella Trust moved for entry of a default judgment against the Verduce Trust, Verduce in his individual capacity, and the other parties. The trial court entered a default judgment against Verduce and his trust in March 2010. The judgment ordered Verduce and the Verduce Trust to pay \$217,681.17 to the Cucinella Trust. The trial court entered a second default judgment for foreclosure on the same date. The judgment for foreclosure provided that the Wayne County Sheriff shall sell the properties at issue under MCL 600.3125 and further provided that the Verduce and the Verduce Trust had six months from the date of the sale to redeem the properties. Finally, the trial court also ordered the release of the escrowed rent payments to the Cucinella Trust upon the expiration of the redemption period.

The Cucinella Trust purchased the properties at the sheriff's sale in May 2010. The Cucinella Trust bid \$233,890.18. The trial court entered an order confirming the sale in June 2010.

In May 2010, Verduce and the Verduce Trust moved to quash or amend the default judgments. Verduce and the Verduce Trust alleged that the Cucinella Trust perpetuated a fraud on the court by alleging that it had not breached the land contract when it actually had breached the contract, and by asking for possession and attorney's fees when that relief was not permitted. They also alleged that Verduce in his individual capacity could not be liable under the land

contract because he was not a party to it. Verduce and his trust further maintained that the trial court erred by granting the Cucinella Trust two remedies: it granted judgment on the balance owed under the land contract and granted a judgment of foreclosure. Verduce and the Verduce Trust alleged that the trial court should not have released the escrowed funds prior to the expiration of the redemption period and should have provided for credits against the amount due in the event that the rents are distributed to the Cucinella Trust.

In June 2010, the Cucinella Trust again moved for the release of the escrowed funds. It recognized that the trial court had entered an order providing for the release of the funds after the expiration of the redemption period, but nevertheless asked the trial court to release the funds early to pay the unpaid taxes from 2008 and 2009. The trial court entered an order releasing the escrowed funds to the Cucinella Trust to pay the unpaid taxes and further ordered that future rents paid into the fund could be used to pay the balance remaining on the back taxes and to cover building maintenance. The order further provided that the balance remaining in the escrow account should be distributed to the Cucinella Trust upon the expiration of the period of redemption.

In October 2010, the trial court entered its order on Verduce and the Verduce Trust's motion to quash. The court ordered that the prior judgments were amended to provide that the amount owing under the judgment should be offset by any funds taken from the escrowed rents to pay the 2008 and 2009 taxes. It also amended the judgment to no longer include more than \$12,000 in attorney fees. The trial court entered an additional order in that same month vacating the judgment to the extent that it applied to Verduce in his individual capacity.

In January 2011, the Cucinella Trust asked the trial court to award it past due rents from several tenants and to enter a deficiency judgment against the Verduce Trust. The Cucinella Trust alleged that several tenants, including Verduce in his individual capacity, Gary Ostrom, and Jay Cucinella, had not paid their rents into the escrow account, but nevertheless continued to occupy space without paying rent. It also noted that there remained unpaid property taxes from before the Cucinella Trust purchased the property. For these reasons, the Cucinella Trust asked the trial court to order the hold over tenants to pay rent for period that they occupied the property at fair market rates and asked the court to enter a deficiency judgment for the balance of unpaid taxes remaining from before the Cucinella Trust's purchase of the properties at foreclosure.

In response, the Verduce Trust argued that the Cucinella Trust was not entitled to include the amount of taxes that were due, but not paid by the Cucinella Trust, in the judgment. When those amounts are subtracted, the Verduce Trust maintained, the amount bid by the Cucinella Trust at the sheriff's sale exceeded the amount actually owed under the land contract. For that reason, it asked the trial court to order the Cucinella Trust to pay the Verduce Trust the difference between the amount that the judgment should have been and the amount the Cucinella Trust bid at the foreclosure sale.

The Cucinella Trust replied that the Verduce Trust was not entitled to any relief because it never filed a properly supported motion for relief from the default judgment under MCR 2.603 and the time for doing so had long since passed. It also noted that the Verduce Trust consented to the order giving it a credit in the event that the escrowed funds were used to pay unpaid taxes and, accordingly, should not now be heard to complain about that procedure.

In further reply, the Cucinella Trust noted that the Verduce Trust agreed under the land contract to pay all taxes, which obligation continued through the end of the redemption period. As such, the trial court did not err when it included the amount of unpaid taxes in the judgment on the land contract. It also directed the trial court's attention to the fifth count of its complaint, which asked the court to enter judgment for any damages incurred under the land contract during the period of redemption.

In April 2012, the trial court entered its final judgment. The trial court rejected as untimely the Verduce Trust's contention that the original judgment should not have included unpaid taxes that the Verduce Trust owed on the properties. It did agree that the interest rate should be increased to 8% as provided under the land contract. The trial court then adjusted the original judgment to include interest and several costs for a total of \$254,601.85, which it then reduced by the amount that the Cucinella Trust bid at the foreclosure sale, which was \$233,890.18. It then awarded the Cucinella Trust a deficiency judgment equal to the remaining balance of \$20,711.77. Finally, the trial court awarded the Verduce Trust the full \$39,758.25 in rent that had been deposited in escrow. After subtracting the amount of the deficiency judgment from the amount due to the Verduce Trust, the trial court concluded that the Cucinella Trust had to pay the Verduce Trust \$19,046.48.

In May 2012, the Verduce Trust appealed to this Court.

In July 2012, the Cucinella Trust asked this Court to remand the case back to the trial court in order to hear a motion to vacate the April 2012 judgment. Specifically, the Cucinella Trust argued that it recently discovered that the Verduce Trust had obtained a tax refund for property taxes that had been paid with funds from the escrowed rents. Because the trial court ordered the Cucinella Trust to repay those funds to the Verduce Trust, the Verduce Trust stood to gain a double recovery. The Cucinella Trust asked this Court to dismiss the appeal and order a remand so that the trial court might make a "full review."

This Court granted the Cucinella Trust's motion in August 2012 and remanded the case back to the trial court to permit the Cucinella Trust an opportunity to seek relief from the judgment in light of the new evidence.<sup>1</sup> This Court retained jurisdiction.

Later that same month, the Cucinella Trust filed its motion to vacate the April 2012 final judgment with the trial court. It noted that the trial court had awarded the Verduce Trust the full amount of the escrowed rents despite the fact that the Verduce Trust agreed that those funds should be used to pay the back taxes that the Verduce Trust was obligated to pay under the terms of the land contract. It also noted that since the final judgment it had been revealed that the Verduce Trust had obtained a tax refund for the 2009 taxes that were paid with the escrowed funds. The Cucinella Trust maintained that the Verduce Trust was not entitled to the funds used to pay the taxes because the Verduce Trust was obligated to pay those amounts under the land contract. It also maintained that the tax refund properly belonged to the Cucinella Trust.

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<sup>1</sup> See *Frances Cucinella Trust v David L Verduce*, unpublished order of the Court of Appeals, entered August 16, 2012 (Docket No. 310213).

Accordingly, the Cucinella Trust asked the trial court to vacate its judgment to the extent that it awarded the full amount of the escrowed rents to the Verduce Trust, order the return of the \$13,712.75 tax refund, and order that any additional tax refunds should be paid to the Cucinella Trust. Finally, because the Verduce Trust committed a fraud on the court by concealing the tax proceedings, the Cucinella Trust asked the trial court to award it costs and attorney fees.

In October 2012, the trial court entered an amended final judgment. The trial court refused to vacate its decision to award the Verduce Trust the full amount of the rents placed into escrow during the litigation. However, it agreed that the Verduce Trust was not entitled to have the Cucinella Trust repay the escrowed funds used to pay the taxes to the extent that the Verduce Trust received a refund of those payments from the taxing authority. Accordingly, it reduced the judgment in the Verduce Trust's favor by the amount of the tax refund that the Verduce Trust received. After this adjustment, the Cucinella Trust had to pay \$5,333.73 to the Verduce Trust. The trial court also ordered that any future refunds should be paid to the Cucinella Trust.

We now consider Verduce and the Verduce Trust's appeal.

## II. JUDGMENT ON THE LAND CONTRACT

### A. STANDARDS OF REVIEW

On appeal, the Verduce Trust argues that the trial court erred when it calculated the amount due under the land contract and, therefore, erred when it calculated the deficiency that the Verduce Trust owed to the Cucinella Trust after it breached the land contract. This Court reviews de novo a trial court's judgment in an equitable action. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013). This Court also reviews de novo the proper interpretation and application of statutes, *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013), and the proper interpretation of contractual agreements, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Finally, this Court reviews a trial court's decision to set aside a default or grant relief from judgment for an abuse of discretion. *CD Barnes Associates, Inc v Star Heaven, LLC*, 300 Mich App 389, 421-422; 834 NW2d 878 (2013). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

### B. THE DEFAULT JUDGMENT

Verduce and his trust first argue that the trial court erred when it included the balance of the unpaid real property taxes from 2008 and 2009 as part of the amount that the Verduce Trust owed under the land contract. Specifically, they contend that MCL 600.3145 precluded the trial court from including the unpaid taxes in the judgment and the land contract did not provide that the unpaid taxes could be included in the balance due.

The trial court entered the default against the Verduce Trust in March 2010. In the default judgment, the trial court calculated the total due under the land contract to be \$217,681.17, which included the unpaid balance of the taxes incurred in 2008 and 2009. Verduce and his trust then moved to "quash" or "conform" the default judgment in May 2010. In that motion, Verduce and the Verduce Trust did not argue that the judgment should be

amended or set aside because it included the 2008 and 2009 taxes that were due, but unpaid. Ultimately, although the trial court did not specify the grounds for doing so, it elected to provide Verduce and the Verduce Trust with some of the relief they requested in the motion; it amended the default judgment by subtracting the attorney fees from the award and it vacated the judgment to the extent that it applied to Verduce in his individual capacity.

In January 2011, the Cucinella Trust moved for entry of a deficiency judgment. In response to that motion, Verduce and the Verduce Trust argued—for the first time—that the original judgment should not have included the taxes that the Verduce Trust should have paid in 2008 and 2009.

After additional briefings, meetings, and motions, the trial court held a hearing to address all the remaining claims in March 2012. Before turning to other issues, the trial court acknowledged that the Verduce Trust had challenged whether the \$217,681.14 default judgment was accurate; however, it stated that the judgment would “stand.” The court explained: “That judgment was entered as a default judgment. It has been effectively approved, and agreed to on at least [] three other occasions and in two orders that have been entered by this court. And now there is a challenge to it and I think that challenge is untimely.”

On appeal, Verduce and the Verduce Trust do not address the trial court’s reason for refusing to grant relief from the default judgment—namely, that their request for relief was untimely. Instead, they merely reiterate the arguments that they made to the trial court after it granted their initial request for relief from the default. By failing to address the actual reasoning underlying the trial court’s exercise of discretion, Verduce and the Verduce Trust have abandoned this claim of error. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (stating that this Court will not even consider granting relief when the appellant fails to dispute the actual basis for the trial court’s ruling).

In any event, on this record, we cannot conclude that the trial court abused its discretion when it declined to consider Verduce and the Verduce Trust’s argument that the judgment should not have included the unpaid balance of the taxes from 2008 and 2009 in the judgment.<sup>2</sup> See *CD Barnes Associates*, 300 Mich App at 421-422. A party against whom a default was taken has 21 days to move to set aside the default. MCR 2.603(D)(2)(b). Hence, the request for relief was plainly untimely under that rule. Even when requesting relief under MCR 2.612, the moving party must request the relief within “a reasonable time.” MCR 2.612(C)(2). Here, Verduce and the Verduce Trust did not contest the trial court’s decision to include unpaid, but owing, taxes in the judgment until approximately 10 months after it entered the default judgment. During this time, the trial court considered various motions, including the Cucinella Trust’s request that the escrowed rents be used to pay the delinquent taxes, amended the judgment in Verduce’s favor, and the parties proceeded in reliance on the original—and to that point—uncontested amount of the default judgment. On this record, we cannot state that the trial court’s decision to not provide

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<sup>2</sup> Verduce and his trust also mention that the Cucinella Trust was not entitled to its attorney fees. However, as noted above, the trial court amended the judgment to remove the award of attorney fees.

further relief from the default judgment fell outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

The trial court did not abuse its discretion when it refused to further modify the default judgment.

### C. ESCROWED RENTS

In a related argument, Verduce and the Verduce Trust argue that the trial court erred when it failed to order the Cucinella Trust to fully repay the \$39,758.25 in rent that had been deposited in escrow, including those amounts that the Cucinella Trust used to pay unpaid taxes.

At the March 2012 hearing, the trial court agreed that the full amount of rent deposited into escrow during the litigation belonged to the Verduce Trust. For that reason, it ordered the Cucinella Trust to pay \$39,758.25 to the Verduce Trust. However, it also determined that the amount that the Cucinella Trust owed should be offset by the amount that the Verduce Trust owed to the Cucinella Trust as a deficiency. After subtracting the deficiency, the court noted: “that would leave due and owing to the Verduce Trust the amount of 19 thousand let’s see—19 thousand 46 dollars and 48 cents.” The court also provided that the Cucinella Trust had 30 days to pay the difference and, if not paid, provided that the Verduce Trust could place a lien on the real property. The trial court gave effect to these decisions in its April 2012 final judgment. Accordingly, the trial court did in fact order the Cucinella Trust to repay the full amount.

Verduce and his trust also contend that the trial court erred when it gave the Cucinella Trust a credit against the \$39,758.25 equal to the amount of the Verduce Trust’s deficiency under the land contract. Specifically, Verduce and the Verduce Trust contend that, if the trial court had not erred by including the unpaid taxes in the amount due under the land contract, there would have been no deficiency by which to offset the escrowed rents. As already noted, the trial court did not abuse its discretion when it declined to modify the default judgment. As such, Verduce and the Verduce Trust have not established that the trial court erred when it calculated the deficiency and credited that deficiency against the amount owed to the Verduce Trust by the Cucinella Trust.

Verduce and the Verduce Trust also argue that the trial court erred when it reduced the amount that the Cucinella Trust owed to the Verduce Trust by the amount of the tax refund that the 2009 tax refund paid to the Verduce Trust. During the litigation, the Cucinella Trust obtained permission from the trial court to use funds deposited into escrow to pay the 2009 taxes. Later the trial court determined that those funds rightfully belonged to the Verduce Trust. For that reason, it ordered the Cucinella Trust to repay those funds to the Verduce Trust, which included the funds that the Cucinella Trust used to pay the taxes. Accordingly, when the Verduce Trust took the tax refund, it effectively received double compensation for the funds—it received the benefit of the order compelling the Cucinella Trust to repay the funds used to pay the taxes and then received a partial refund on the payment of those same taxes. Accordingly,

the trial court did not err when it reduced the amount that the Cucinella Trust had to repay by the amount of the tax refund paid to the Verduce Trust.<sup>3</sup>

#### D. SANCTIONS

Finally, Verduce and the Verduce Trust argue that they are entitled to sanctions on the grounds that the Cucinella Trust engaged in a series of improprieties during the litigation. After carefully considering the record, we do not agree that the Cucinella Trust's efforts to secure its rights in the litigation violated MCR 2.114, or constituted a frivolous claim or defense under MCR 2.625(A)(2) or MCL 600.2591.

#### III. CONCLUSION

The trial court did not abuse its discretion when it refused to grant Verduce and the Verduce Trust additional relief from the default judgment. The trial court also did not err when it offset the amount that the Cucinella Trust owed to the Verduce Trust by the deficiency and the tax refund.

There were no errors warranting relief.

Affirmed. As the prevailing party, the Cucinella Trust may tax its costs. MCR 7.219(A).

/s/ William B. Murphy  
/s/ Michael J. Kelly  
/s/ Amy Ronayne Krause

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<sup>3</sup> The Verduce Trust also argues in passing that it would be inequitable for the Cucinella Trust to obtain the benefit of its efforts to reduce the tax liability. However, Verduce and the Verduce Trust abandoned this argument on appeal by failing to adequately brief the facts and law. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006). Further, the fact that the Verduce Trust's lawyers subtracted their fee from the refund does not alter the fact that it received the full benefit of the refund because it would otherwise have been liable for its attorney's fees. See *Kasben v Hoffman*, 278 Mich App 466, 473; 751 NW2d 520 (2008).